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NOTE

FAMILIAL CONSENT FOR REGISTERED ORGAN DONORS: A LEGALLY REJECTED CONCEPT[†]

Kristin Cook[‡]

INTRODUCTION

Thousands of Americans are waiting for lifesaving transplants.¹ In December 2002, Ora Frisby, a Philadelphia resident desperately in need of such a transplant, got the second chance at life that comes to only a few.² Ms. Frisby, only fifty-three years old and a grandmother of five, was suffering from agonizing dialysis treatments and the bleak reality that her life was nearing its end.³ After four and a half years, and thanks to one Philadelphia resident who donated a vital organ after death, Ms. Frisby received the kidney transplant she needed.⁴ Due to this “gift of life,” Ms. Frisby’s prognosis is now a “long[,] healthy life with her family.”⁵

Unfortunately, many of those in need of an organ transplant are not as fortunate as Ms. Frisby.⁶ The number of needed transplants far

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¹ Donate Life, <http://www.organdonor.gov/> (last visited Sept. 8, 2006) (stating that approximately 92,000 people are waiting for an organ transplant).

² *Gift of Life Donor Program; Organ Donor Program Leads Nation in Number of Transplants*, BIOTECH WK., Feb. 12, 2003, at 65, 65.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See Organ Procurement and Transplantation Network, <http://www.optn.org> (last visited Sept. 8, 2006) (follow “View Data Reports” hyperlink under “Data”; then follow “National Data” hyperlink; then choose category “Waiting List Removals” and choose organ “All”; then follow “Death Removals by State by Year” hyperlink) (providing national data on the transplant candidate waiting list and removals).

exceeds the number of organs recovered from organ donors, and, consequently, many deaths occur while waiting for an organ transplant.⁷ The number of registered organ donors could be adequate to meet demand,⁸ but many organs are not harvested from these organ donors because their families fail to give their consent.⁹ Without familial consent, medical professionals are extremely reluctant to remove organs due to fear of lawsuits against them by a decedent's disgruntled family.¹⁰

This Note argues that donor registrations should be respected because failing to honor an organ donor's wishes is illegal and immoral. Hence, familial consent should not be sought in this context.¹¹ Part I of this Note lays out the current state of organ donation, discussing the need for organ donors, the reality that familial consent is made para-

from the list due to deaths).

⁷ See *id.*; Donate Life, *supra* note 1.

⁸ "Each year in the United States, approximately 15,000 people die under conditions that make them medically suitable potential organ donors." Golden State Donor Services, It's About Giving Life, http://www.gsds.org/newsroom/stats_facts.html (last visited Sept. 1, 2006). A single donor can supply up to eight organs for transplantation (intestine, two lungs, liver, two kidneys, pancreas, and heart), so if organs were procured from every person who died each year under conditions making them suitable for organ donation, 120,000 transplants could take place. *Id.* Obviously, not all of these people would have registered as organ donors, but the number registered is enough to come close to meeting, or actually meeting, the approximately 92,000 organs transplants needed each year. Donate Life, *supra* note 1. See Gift of Life Donor Program, Philadelphia Region Leads Nation in Number of Organ Donors 2003, http://www.donors1.org/news/2003_numbers.html (last visited Sept. 8, 2006) (stating that over forty-eight percent of registered drivers in Delaware have registered as organ donors); Gina Kolata, *Organ Shortage Clouds New Transplant Era*, 221 SCIENCE 32, 33 (1983) (referring to a Gallup poll in which "70 percent of Americans said they were willing to donate their organs").

⁹ Jeffrey M. Prottas, *Organ Procurement in Europe and the United States*, 63 MILBANK MEMORIAL FUND Q. 94, 101 (1985) (stating that an organ procurement agency will not procure organs against the wishes of the deceased's next of kin even if the deceased has a signed organ donor card); Golden State Donor Services, *supra* note 8 (asserting that "next-of-kin will be consulted before donation takes place" and that "the refusal rate among families of potential donors nationwide is around 50 percent").

¹⁰ Leonard H. Bucklin, *Woe unto Those Who Request Consent: Ethical and Legal Considerations in Rejecting a Deceased's Anatomical Gift Because There Is No Consent By Survivors*, 78 N.D. L. REV. 323, 339 (2002) (indicating that fear of being sued by the family for not seeking their consent is a major reason physicians consistently do seek consent); Kolata, *supra* note 8, at 33 (stating that "physicians fear that if they suggest that the patient's organs be removed, the family may later sue").

¹¹ This Note means to argue that familial consent should not be sought when the deceased is a registered organ donor. The issue of whether familial consent should be sought when the deceased is not a registered organ donor is beyond the scope of this Note.

mount to the decedent's wishes,¹² and the fact that the basis for this practice is the medical profession's fear of lawsuits brought by surviving family members.¹³ Part II discusses the Uniform Anatomical Gift Act (UAGA) and its provisions, which make it illegal to ask for a family's permission to procure organs when the deceased is a registered organ donor.¹⁴

The UAGA, as adopted in every state,¹⁵ provides that familial consent should not be sought when the decedent is a registered donor,¹⁶ but the current practice in the medical profession is to disregard this aspect of the UAGA.¹⁷ Therefore, Part III goes further to suggest that the practice of disregarding donors' wishes is also illegal on contract grounds because a valid contract exists between a donor and an Organ Procurement Organization (OPO). On the theory that an organ donor card is a valid contract, Part III also proposes one solution for medical professionals who are faced with litigation from a registered organ donor's family—a countersuit against the family for tortious interference with a contract. This will not relieve physicians of the time burden and stress that accompanies litigation, but at least physicians could attain some recovery in this way.

Furthermore, Part IV argues that donor registrations should be respected because there is no legitimate threat of litigation against the medical profession for following donors' wishes since any action brought would lack merit. If a physician procures organs from a registered organ donor, and the family objects because their consent was not sought, there is nothing for the physician to fear because the UAGA grants immunity in such circumstances.¹⁸ Additionally, Part IV will address the insufficiency of a property conversion claim or an emotional distress claim brought by a decedent's family against a medical professional.

¹² See generally Bucklin, *supra* note 10.

¹³ *Id.*

¹⁴ UNIF. ANATOMICAL GIFT ACT § 2(h) (1987) (stating that familial consent should not be sought when the decedent is a registered donor).

¹⁵ Every state has adopted some form of the UAGA. UNIF. ANATOMICAL GIFT ACT 1987 Refs & Annos (West, Westlaw 2003 Main Volume). This Note will use the term "UAGA" to refer to the model act but, for simplicity, will also use "UAGA" to refer collectively to states' anatomical gift acts.

¹⁶ UNIF. ANATOMICAL GIFT ACT § 2(h).

¹⁷ Bucklin, *supra* note 10, at 324-25 ("One survey found only four states take advantage of the Uniform Anatomical Gift Act (UAGA) provisions by retrieving organs solely on the authority of a donor document.").

¹⁸ UNIF. ANATOMICAL GIFT ACT § 2(h).

Part V will address the moral context by pointing out society's emphasis on autonomy.¹⁹ That Part will discuss how the importance of autonomy in the organ donor setting can be analogized to judicial affirmation of autonomy as key in the issue of informed consent and in the use of advance directives.

The Conclusion summarizes these points and discusses the reality of the medical profession avoiding litigation in this context.

I. THE CURRENT STATE OF ORGAN DONATION

The current state of organ donation is clearly inadequate. Approximately 90,000 people are waiting for organ transplants, yet very few actually receive them.²⁰ An estimated seventy-four people receive an organ transplant each day, but this is countered by the fact that another seventeen die every day while waiting for transplants.²¹ Hence, the removal of a significant number of names from the transplant waiting list is not due to people having obtained transplants but is instead due to deaths of many who are waiting. To date, 65,978 Americans have been removed from the transplant waiting list because they died before receiving the necessary organ or tissue transplant.²² Thus, the shortage of organs available for transplantation is a major problem.

It is estimated that the number of prospective donors each year would be sufficient to satisfy demand if organs were in fact harvested from those donors.²³ Because multiple organs and tissues can be harvested from a single donor, that single donor can save several lives.²⁴ In 2005, for instance, 21,212 transplants were performed as a result of organ and tissue recovery from only 7,593 deceased donors.²⁵ Clearly,

¹⁹ See MARSHA GARRISON & CARL E. SCHNEIDER, *THE LAW OF BIOETHICS: INDIVIDUAL AUTONOMY AND SOCIAL REGULATION* 27 (2003) (stating that "the central principle of American bioethics is autonomy").

²⁰ Organ Procurement and Transplantation Network, Data, <http://www.optn.org/data/> (last visited Sept. 8, 2006) (showing a breakdown of the number of transplants needed for specific organs); Donate Life, *supra* note 1.

²¹ Donate Life, *supra* note 1.

²² Organ Procurement and Transplantation Network, *supra* note 6.

²³ Bucklin, *supra* note 10, at 324. A 1983 Gallup poll found that seventy percent of Americans are willing to be organ donors. Kolata, *supra* note 8, at 33.

²⁴ See Organ Procurement and Transplantation Network, *supra* note 6.

²⁵ See Organ Procurement and Transplantation Network, Multiple Transplants, <http://www.optn.org> (last visited Sept. 8, 2006) (follow "View Data Reports" hyperlink under "Data"; then follow "National Data" hyperlink; then choose category "Transplant" and choose organ "All"; then follow "Deceased Donor Transplants by State" hyperlink); Organ Procurement and Transplantation Network, <http://www.optn.org> (last visited Sept. 8, 2006) (follow "View Data Reports" hyperlink under "Data";

organ demand could even be exceeded if all potential donations were obtained every year, but that is far from the reality.²⁶

The primary reason that many organ donations are not harvested is because the medical profession fears lawsuits from decedents' surviving next of kin for harvesting organs without familial consent.²⁷ Hence, the medical profession regularly makes familial consent paramount to the decedent's wishes in the context of organ donation.²⁸ Although most people assume that registering as an organ donor will ensure that their wishes will be respected at the time of their death, that is not the case.²⁹ In actuality, it is the decedent's next of kin who generally determine whether the decedent's organs may be procured, even if the decision is contrary to the decedent's written directive.³⁰ Though a decedent may be a registered organ donor, it is likely that no

then follow "National Data" hyperlink; then choose category "Donor" and choose organ "All"; then follow "Deceased Donors by State of DSA" hyperlink) (compare the 2005 totals for "All States").

²⁶ See Kolata, *supra* note 8, at 33 (stating that most doctors want to secure consent from families before participating in organ procurement).

²⁷ *Id.* (stating that doctors "want to obtain the consent of the families before going ahead and referring patients as organ donors" and indicating that one reason doctors do not make an effort to procure organs for transplantation is "fear of legal reprisals"). See generally Daniel G. Jardine, Comment, *Liability Issues Arising out of Hospitals' and Organ Procurement Organizations' Rejection of Valid Anatomical Gifts: The Truth and Consequences*, 1990 WIS. L. REV. 1655 (1990) (discussing the medical profession's practice of allowing familial wishes to trump the wishes of deceased potential organ donors).

²⁸ Thomas D. Overcast et al., *Problems in the Identification of Potential Organ Donors: Misconceptions and Fallacies Associated with Donor Cards*, 251 JAMA 1559, 1561-62 (1984). See Press Release, Gift of Hope, Lives to be Saved Through New Illinois Law Honoring Individuals' Wishes to Become Organ/Tissue Donors (July 6, 2005), available at <http://www.giftofhope.org/newsroom/news-releases/2005/New%20Illinois%20law%206%2005.pdf> (stating that "about 19% of potential donors enrolled as a 'yes' in the Illinois organ/tissue donor registry each year have had their intent overruled by family members," and, "[a]s a result, the individual's wishes to donate are not honored and opportunities to save lives through transplantation are lost" (internal quotations omitted)).

²⁹ See generally THE HASTINGS CTR., ETHICAL, LEGAL AND POLICY ISSUES PERTAINING TO ORGAN PROCUREMENT: A REPORT OF THE PROJECT ON ORGAN TRANSPLANTATION (1985) [hereinafter HASTINGS CENTER REPORT] (finding that many who have registered as organ donors do not have that desire respected after their death when surviving next of kin does not consent to the donation).

³⁰ Elizabeth McKenny & Bridgette Parker, *Legal and Ethical Issues Related to Nonheart Beating Organ Donation*, 77 AORN J. 973, 974 (2003) (stating that "most hospitals currently rely on surrogate consent from family members" whether or not there is a donor card). See generally Jardine, *supra* note 27; *Medical Update: Organ Donors Must Pipe Up*, CONSUMER REP. ON HEALTH, Nov. 1993, at 126 (stating that, in the context of organ donation, "the final decision is generally left to the closest surviving relatives, even if the would-be donor left written instructions").

organs will be harvested from that cadaver.³¹ Reports show that when next of kin are available and oppose donation, only twelve percent of Organ Procurement Offices (OPOs) are likely to procure based on a donor card or comparable document,³² and less than twenty-five percent of medical professionals said they would proceed with organ procurement in situations where a family member could not be located, despite the presence of a written directive.³³ Another study determined that thirty-one percent of OPOs follow the decedent's wishes, thirty-one percent follow the next of kin's wishes, and twenty-one percent procure organs only if neither party objects.³⁴ Essentially, a donor's gift, evidenced by a written directive such as a donor card, is almost always refused unless that gift is ratified by the decedent's next of kin.³⁵ Such failure by physicians to respect donor cards and treat the cards as binding legal documents often makes an attempt to become an organ donor futile.³⁶

Hospitals, after all, have an incentive to satisfy the surviving family members because the survivors will be the ones providing future business and good will to the hospital. Refusing to harvest organs without familial consent, irrespective of whether the decedent had a donor card, allows hospitals to keep from losing future business and to avoid costly litigation brought by a family member who may oppose the procurement.³⁷ Consequently, even if it is conceded that the authority to donate lies with the decedent, medical professionals view legal accountability to living family members as a far greater threat than liability to the deceased. Such a formidable threat of litigation allows for familial veto power over the decedent's written directive.³⁸

The medical profession's fear of litigation is understandable considering the number of malpractice claims brought each year,³⁹ but the

³¹ See generally Jardine, *supra* note 27.

³² Dave Wendler & Neil Dickert, *The Consent Process for Cadaveric Organ Procurement: How Does It Work? How Can It Be Improved?*, 285 JAMA 329, 329 (2001).

³³ HASTINGS CENTER REPORT, *supra* note 29, at 14.

³⁴ Wendler & Dickert, *supra* note 32, at 329.

³⁵ *Organ Donation*, POSTGRADUATE MED., Jan. 2004, at 67, 68 (indicating that doctors will not even consider organ donation unless the family agrees); Prottas, *supra* note 9, at 100-01.

³⁶ Ann M. Bazil & Bruce R. Goldberg, *ISBA Moves to Eliminate Roadblocks to Organ Donation and Transplantation*, 73 ILL. B.J. 372, 373 (1985).

³⁷ Michelle Bourianoff Bray, *Personalizing Personality: Toward Property Right in the Human Bodies*, 69 TEX. L. REV. 209, 224 (1990).

³⁸ See generally Jardine, *supra* note 27.

³⁹ See David Steves, *Oregon Measure's Malpractice Awards Cap Sharply Divides Medical Professionals*, REG.-GUARD, Oct. 3, 2004, at A1 (stating that the American Medical Association considers twenty states to be "in crisis" regarding

following sections of this Note will argue that fear of litigation is largely unfounded because no legitimate causes of action exist. Not only will medical professionals who procure organs from a decedent who has a written directive establishing the desire to donate not be subject to liability, but they are actually acting illegally and unethically in failing to procure such organs.

II. ILLEGALITY OF SEEKING FAMILIAL CONSENT UNDER THE UNIFORM ANATOMICAL GIFT ACT (UAGA)

The UAGA makes it illegal to seek familial consent when a decedent is a registered organ donor.⁴⁰ All fifty states and the District of Columbia have adopted some form of the UAGA,⁴¹ which, among other things, specifically provides that “an anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor’s death.”⁴² The UAGA also includes an immunity provision for medical professionals acting in good faith when removing organs, and courts have consistently granted hospitals and physicians protection under this provision.⁴³ As this Note will lay out in the following sections, these provisions should relieve any anxieties medical professionals may have about proceeding in accordance with a donor’s wishes without gaining consent from the donor’s next of kin.⁴⁴

medical malpractice insurance costs); C. Paul Wazzan, *An Economic Assessment of Damage Caps in Medical Malpractice Litigation Imposed by State Laws and the Implications for Federal Policy and Law*, 16 HEALTH MATRIX 693, 698 (stating that “expenses related to malpractice liability . . . totaled approximately \$27 billion nationwide” in 2003). In 2004, the average payment per medical malpractice claim was between \$124,747 and \$655,767, depending on the state. *Id.* at 705-06.

⁴⁰ UNIF. ANATOMICAL GIFT ACT § 2(h) (1987).

⁴¹ UNIF. ANATOMICAL GIFT ACT 1987 Refs & Annos (West, Westlaw 2003 Main Volume).

⁴² This provision protects medical professionals by making clear that familial consent should not be sought when the decedent is an organ donor. UNIF. ANATOMICAL GIFT ACT § 2(h).

⁴³ *Id.* § 11(c); see *Rahman v. Mayo Clinic*, 578 N.W.2d 802, 806-07 (Minn. Ct. App. 1998) (upholding summary judgment for clinic and doctors in an action against them seeking damages for retaining the decedent’s pelvic block because the defendants acted in good faith and made an honest attempt to comply with the decedent’s wishes); see also *Callsen v. Cheltenham York Nursing Home*, 624 A.2d 663, 665 (Pa. Commw. Ct. 1993) (requiring an evidentiary showing of “good faith” by hospital and nursing facility to qualify for immunity when relevant facts are contested).

⁴⁴ Though the UAGA requires medical professionals not to seek permission from a decedent’s next of kin for procuring his or her organs if the decedent is a regis-

A. Overview of the UAGA

The UAGA was originally promulgated in 1968 but was revised in 1987.⁴⁵ According to the Hastings Center Report, the purpose of the 1987 UAGA was to deal with the inadequacies in the system of organ donation, including “[f]ailure on the part of medical personnel to recover organs on the basis of written directives.”⁴⁶ That report found that making familial consent paramount to decedents’ wishes is a key problem hindering organ donation.⁴⁷ Hence, the 1987 UAGA specifically states that familial consent is not required if the decedent made an anatomical gift.⁴⁸ In fact, it states that next of kin should not be consulted in such a situation.⁴⁹

Also significant in the 1987 UAGA is that no witnesses are required to have observed the document of the gift.⁵⁰ The Act defines a “document of gift” as “a card, a statement attached to or imprinted on a motor vehicle operator’s or chauffeur’s license, a will, or other writing used to make an anatomical gift.”⁵¹ Therefore, a decedent’s next of kin cannot claim that a donor card is invalid due to no witness being present at the time of its signing.

Furthermore, the UAGA provides an immunity provision for medical professionals acting in good faith.⁵² This provision gives all medical professionals an affirmative defense in a suit brought by a next of kin for removing organs from a registered organ donor. In other words, even if all of a plaintiff’s allegations of procurement without familial consent are true, a medical professional’s assertion of

tered organ donor, it does not provide any causes of action for its violation. UNIF. ANATOMICAL GIFT ACT § 2(h). Additionally, no state anatomical gift acts provide any such causes of action. *See generally* UNIF. ANATOMICAL GIFT ACT 1987 Refs & Annos (West, Westlaw 2003 Main Volume). Accordingly, rather than discussing how medical professionals could be held liable for failing to respect donor registrations, this Note’s main focus is on why medical professionals should not be afraid to respect donor registrations, even absent familial consent, and that they have a moral obligation to respect donor registrations.

⁴⁵ UNIF. ANATOMICAL GIFT ACT 1987 Refs & Annos (West, Westlaw 2003 Main Volume).

⁴⁶ HASTINGS CENTER REPORT, *supra* note 29, at 15.

⁴⁷ *Id.* at 15-16.

⁴⁸ UNIF. ANATOMICAL GIFT ACT § 2(h) (1987).

⁴⁹ *Id.* (“An anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor’s death.”).

⁵⁰ *Id.* § 2(b).

⁵¹ *Id.* § 1(3).

⁵² *Id.* § 11(c). *See infra* Part IV.A.

good faith prevents the plaintiff from having a valid case.⁵³ This immunity will be discussed further in Part IV A.

The UAGA does not provide any causes of action for its violation, but it instead serves as statutory protection for medical professionals who adhere to donor registrations. Its provisions make clear that medical professionals should not ask a donor's next of kin for permission before harvesting the donor's organs.⁵⁴ Therefore, a lawsuit brought by a next of kin for such action would be unsuccessful.

B. Adoption of UAGA Provisions by States

The UAGA has been adopted in full or with minor modifications by every state and the District of Columbia.⁵⁵ Therefore, donor registration should be treated as legally binding in every state. There is no state in which medical professionals would not be protected by their respective state's anatomical gift act, so failing to adhere to its provisions should not be excused due to fear of litigation.

New Mexico's Anatomical Gift Act, for example, even goes so far to enforce the legally binding effect of donor registration by titling one of its provisions "Document of gift as a legal document."⁵⁶ This provision states that "a document of gift, which includes a motor vehicle driver's license, constitutes a legal document and has sufficient legal authority to be accepted."⁵⁷ Hence, medical professionals should simply not fear lawsuits for removing organs from registered organ donors in New Mexico. Of course, being sued is costly for defendants even if the plaintiffs are not successful,⁵⁸ but, because New Mexico's Anatomical Gift Act makes it clear that a plaintiff would not be successful, it is unlikely that such a suit would be brought. Therefore, medical professionals in that state should be quite comfortable removing organs from donors without consulting the donor's next of kin.

Illinois's Anatomical Gift Act differs from that of other states in that it requires the presence of two witnesses for an anatomical gift

⁵³ Black's Law Dictionary defines an affirmative defense as "[a] defendant's assertion [of] . . . arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true." BLACK'S LAW DICTIONARY 186 (2nd Pocket ed. 2001).

⁵⁴ UNIF. ANATOMICAL GIFT ACT § 2(h)(1987).

⁵⁵ HASTINGS CENTER REPORT, *supra* note 29, at 9.

⁵⁶ N.M. STAT. ANN. § 24-6A-7.1 (West 2005).

⁵⁷ *Id.*

⁵⁸ See Steves, *supra* note 39 (stating that malpractice insurance rates are so high that many physicians are choosing to leave the field); Wazzan, *supra* note 39, at 698.

made by a document other than a will.⁵⁹ The Act also states that a donation by a valid organ donor “shall take effect upon the individual’s death without the need to obtain the consent of any survivor”; thus, even with the slight impediment to donation of requiring witnesses, this Act, like others, does not require familial consent if the decedent has validly registered as an organ donor.⁶⁰ Further simplifying Illinois’s donation process is the fact that the witness requirement only applies to registries made before January 1, 2006.⁶¹ After that date, a written, signed document, such as a card or driver’s license, is “effective without regard to the presence or signature of witnesses.”⁶²

The wording of Illinois’s Anatomical Gift Act evidences the intent to make donor cards legally binding documents. The fact that this Act’s purpose includes recognition “that there is a critical shortage of human organs and tissues available to citizens in need of organ and tissue transplants” implies that the Act should be read as an instrument intended to increase the supply of organ donations.⁶³ Therefore, it is apparent that both the Act’s express wording and its intention make donor registration legally binding. Like other states’ anatomical gift acts, Illinois’s Act should alleviate medical professionals’ apprehension in removing organs from donors, and, hence, next of kin should not be consulted regarding harvesting of organs from a validly registered organ donor in any state.

III. ILLEGALITY OF FAILING TO TREAT DONOR CARDS AS VALID CONTRACTS⁶⁴

Even though the UAGA makes it illegal to disregard a donor’s wishes, the current practice continues to disregard these provisions.⁶⁵ It is understandable that hospitals have an incentive to accommodate the surviving family members’ wishes rather than the decedent’s

⁵⁹ 755 ILL. COMP. STAT. 50/5-20(b) (2005), amended by 755 ILL. COMP. STAT. 50/5-20(b) (2006) (changing the witness requirement in § 5-20(b)).

⁶⁰ *Id.* § 50/5-5(a).

⁶¹ *Id.* § 50/5-20(b) (amended 2005).

⁶² *Id.*; H.B. 1077, 94th Gen. Assemb., Reg. Sess. (Ill. 2005) (establishing first person consent, meaning that organ donor cards are to be deemed valid regardless of whether witnesses were present at its signing).

⁶³ 755 ILL. COMP. STAT. 50/1-5 (2005) (stating that part of the Act’s intent is to facilitate organ donation within Illinois to those individuals who need them).

⁶⁴ It could also be argued that online donor registrations and other forms of registry are also valid contracts, but this Note focuses on the simpler example of registration in the form of donor cards.

⁶⁵ *Organ Donation*, *supra* note 35, at 68 (indicating that doctors will not even consider organ donation unless the family agrees).

wishes because, obviously, the decedent can not file suit.⁶⁶ Even so, this Part argues that there is support beyond the UAGA for respecting donor registrations that makes acting in accord with decedents' wishes more attractive to medical professionals. That support is the argument that it is illegal to fail to treat a donor card as a legally binding document because it is a valid contract.

The process by which one becomes an organ donor creates the expectation that one is creating a legally binding document. Present in the process of becoming an organ donor is an offer, an acceptance, and consideration—the required elements of a contract.⁶⁷ Furthermore, potential organ donors are given adequate information to ensure the contract's validity.

As this Part will also discuss, if there is an intended donee, that person could be seen as a third party beneficiary to the contract. Because a contract is created and there is a third party beneficiary, medical professionals should respect donor registration and not fear lawsuit. In fact, if the next of kin attempts to prevent the procurement, that person is tortiously interfering with a contract and could be sued on such grounds.

A. Process Creates Expectation of a Binding Document: Offer, Acceptance, and Consideration

Through the process of becoming an organ donor, a potential donor has an expectation that a binding obligation is created on the part of OPOs to procure the donor's organs for transplantation.⁶⁸ A contract is formed here because the parties have made a legally enforceable promise; that is, they have made "a commitment . . . that a given event will . . . occur in the future" through express and/or implied language or conduct, and such promise "was made as part of a bargain for valid consideration."⁶⁹ The parties to the contract are the potential organ donor and the OPO.⁷⁰

⁶⁶ A decedent's estate could bring a cause of action, but the estate in these circumstances would likely consist of family members who did not want the decedent's wishes adhered to in the first place.

⁶⁷ RESTATEMENT (SECOND) OF CONTRACTS § 71 (1979) (stating the elements of a contract).

⁶⁸ One survey "of public attitudes toward organ donation and transplantation" revealed that eighty percent of respondents believed an organ donor card should be considered a legal document. Susan Evers et al., *Public Awareness of Organ Donation*, 138 CANADIAN MED. ASS'N J. 237, 237 (1988).

⁶⁹ LEXISNEXIS, CONTRACTS CAPSULE SUMMARY § 1.01 (2004), <http://www.lexisnexis.com/lawschool/study/outlines/html/contracts01.htm>; RESTATEMENT (SECOND) OF CONTRACTS § 71 (1979) (discussing valid consideration).

⁷⁰ The OPOs act through an agent, such as an employee at a donor registry or

The typical process for obtaining a driver's license includes a question of whether the applicant wishes to become an organ donor.⁷¹ This question serves as an offer to a potential organ donor to harvest his or her organs at the time of death so that they may be used for transplantation.⁷² Such an "offer" is the first step in creating a binding contract.⁷³ If the offeree then answers with a yes, he or she is accepting the offer.⁷⁴ One online Illinois organ donor registry even points out that if a "driver's license has a 'Y' under 'Organ Donor'" or if a driver's license applicant "told a driver services facility staff member that [he or she] intend[s] to sign the donor portion" of the license, then that applicant is validly in Illinois's donor registry.⁷⁵ Hence, applicants have reason to believe that they are being made an offer and are legally accepting it by saying yes.⁷⁶

The offeror, in this context, is making an offer that will be carried out through an OPO.⁷⁷ Because the offeror, who is most likely a De-

the attendant who asks a driver's license applicant if he or she would like to be an organ donor.

⁷¹ Alabama statute requires "[t]he following question in the following substantial form shall be asked of each applicant[:]. . . 'Do you wish to have the organ donor designation printed on your driver's license?'" ALA. CODE § 22-19-70 (LexisNexis 2006). A reputable website states that Illinois residents can become organ donors by calling the Illinois Organ/Tissue Donor Registry, by registering online, or "by saying 'yes' when asked whether they want to enroll in the Illinois Organ/Tissue Donor Registry as they receive or renew their driver's licenses at an Illinois driver's license facility." Gift of Hope, First Person Consent, <http://www.giftofhope.org/First-Person-Consent/Illinois-organ-tissue-registry.asp> (last visited Sept. 8, 2006).

⁷² See RESTATEMENT (SECOND) OF CONTRACTS § 24 (stating that "[a]n offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it"); *Southworth v. Oliver*, 587 P.2d 994, 999 (Or. 1978) (holding that under all the surrounding facts and circumstances, an offer has been made if a reasonable person in the alleged offeree's position would have believed that an offer was being made).

⁷³ RESTATEMENT (SECOND) OF CONTRACTS § 24; LEXISNEXIS, *supra* note 69, § 2.01 ("Contract formation requires mutual assent . . . by the parties, generally manifested by an offer and acceptance.").

⁷⁴ RESTATEMENT (SECOND) OF CONTRACTS § 24; LEXISNEXIS, *supra* note 69, § 3.01 ("An offer creates in the offeree the power to form a contract by an appropriate acceptance."); see *Maryland Supreme Corp. v. Blake Co.*, 369 A.2d 1017, 1023-24 (Md. 1977) (stating that the key to creating an offer is in giving the offeree the apparent power to accept the contract).

⁷⁵ CyberDriveIllinois, Illinois Organ/Tissue Donor Registry, <https://www.cyberdriveillinois.com/ContactFormsWeb/register.html> (last visited Oct. 28, 2005).

⁷⁶ See *Maryland Supreme Corp.*, 369 A.2d at 1024-25; RESTATEMENT (SECOND) OF CONTRACTS § 30 (1979) (stating that "an offer invites acceptance in any manner and by any medium reasonable in the circumstances").

⁷⁷ When someone registers as an organ donor, that registration is then available to OPOs, who will then procure the offeree's organs upon his or her death. The

partment of Public Safety employee,⁷⁸ is in a legitimate position to make such an offer and because potential organ donors have reason to believe that they are creating a binding document, a positive response to the offer should create a valid acceptance.⁷⁹

The contract requirement of valid consideration is also met.⁸⁰ Valid consideration requires a bargained-for exchange on behalf of each party, which may consist of a forbearance.⁸¹ A bargained-for exchange exists because the offeror promises to ensure procurement of the offeree's organs in exchange for the offeree's promise to allow procurement and donation upon his or her death.⁸² Additionally, both parties incur a forbearance by undertaking an action in which they were not previously obligated to engage.⁸³ Therefore, there is valid consideration in the organ donor registration process, which completes the requirements for a legal contract and further legitimizes the potential donors' perception of the creation of a binding document.

Parties to a contract must know the nature of the contract.⁸⁴ The parties, here, would presumably understand the contract they are creating because an abundance of information is communicated to potential organ donors detailing the organ donation process.⁸⁵ Alabama, for

Organ Procurement and Transplantation Network, Donation & Transplantation, <http://www.optn.org/about/transplantation/matchingProcess.asp> (last visited Sept. 8, 2006) (describing the donation and transplantation process). See Dianne Carter-Gentry & Cynthia McCurren, *Organ Procurement from the Perspective of Perioperative Nurses*, 80 AORN J. 417, 417 (2004) (describing organ procurement as "the process of removing (ie, harvesting) [sic] organs from a donor who is brain dead in anticipation of implanting them into a waiting recipient").

⁷⁸ In Alabama, for example, an employee at the Alabama Department of Public Safety asks, "Do you wish to be an organ donor?" ALA. ORGAN CTR., DRIVER'S LICENSE BROCHURE, available at <http://www.uab.edu/aoc/drivers3.html>. Illinois residents are also offered enrollment as an organ donor when they renew or receive their driver's licenses at an Illinois Department of Public Safety facility. Gift of Hope, Statistics & Information: Become a Donor, <http://www.giftofhope.org/statistics/information/becomeadonor.asp> (last visited Sept. 8, 2006).

⁷⁹ RESTATEMENT (SECOND) OF CONTRACTS § 30 (1979).

⁸⁰ A contract generally requires consideration in order to be enforceable. RESTATEMENT (SECOND) OF CONTRACTS Ch. 4 Introductory Note.

⁸¹ RESTATEMENT (SECOND) OF CONTRACTS § 71 (discussing valid consideration).

⁸² *Id.* (discussing what constitutes a bargained-for exchange).

⁸³ *Id.* (discussing what constitutes "forbearance").

⁸⁴ RESTATEMENT (SECOND) OF CONTRACTS § 20(1)(a) (stating that there can be no mutual assent to the formation of a contract "if the parties attach materially different meanings to their manifestations and neither party knows or has reason to know the meaning attached by the other").

⁸⁵ Many states give brochures at the Department of Public Safety offices. Both the Alabama Driver's License Brochure and the Motorcycle Manual explain what it means when one says "yes" when asked if he or she wants to be an organ

example, requires by statute that a brochure be provided to a driver's license applicant "explaining the method of expressing an intent to make an anatomical gift."⁸⁶ Furthermore, the abundance of states that have provisions on driver's licenses for organ donation implies familiarity with the issue, the process, and the meaning of becoming an organ donor.⁸⁷

In one survey of "public attitudes toward organ donation and transplantation . . . 80% [of respondents] said that the organ donor card should be considered a legal document."⁸⁸ Therefore, by their own admission, potential organ donors are given adequate information to enter into a valid contract. Moreover, courts have held that a contract need not be read to be effective, indicating that full comprehension of a contract's terms is not required for its validity.⁸⁹

B. Basis for Possible Countersuit Against Next of Kin for Tortious Interference with a Contract

Although this Note argues that suits brought against medical professionals for removing organs from a donor without obtaining consent from the decedent's next of kin are not legitimate, such illegitimacy does not prevent people from bringing them. If suits are brought and consistently dismissed, people may begin to see the futility in suing. Until then, litigation, even if dismissed, will be costly and time-consuming for medical professionals. Therefore, this Note suggests that medical professionals go on the offensive and bring a coun-

donor. See ALA. ORGAN CTR., *supra* note 78; ALA. DEP'T OF PUB. SAFETY, MOTORCYCLE OPERATOR MANUAL, available at <http://www.dps.state.al.us/public/driverlicense/manual/motorcyclemanual.pdf>. Also, donor registries provide many pages of information on the subject. See generally Gift of Hope, <http://www.giftofhope.org> (last visited Sept. 8, 2006).

⁸⁶ ALA. CODE § 22-19-71 (LexisNexis 2006). See ALA. ORGAN CTR., *supra* note 78; ALA. DEP'T OF PUB. SAFETY, MOTORCYCLE OPERATOR MANUAL *supra* note 85.

⁸⁷ Traditionally, almost every state has had provisions on driver's licenses for organ donation, so the longstanding nature of this process also supports the argument that potential donors are adequately informed. Overcast et al., *supra* note 28, at 1560.

⁸⁸ Evers et al., *supra* note 68, at 237.

⁸⁹ See, e.g., *Hill v. Gateway*, 105 F.3d 1147, 1148 (7th Cir. 1997) (holding that terms sent in the box with a product stating that they govern the sale unless the product is returned within 30 days are binding on a buyer who does not return the product). In *Hill*, the buyer had reason to know what the terms indicated but simply did not read them. *Id.* The terms of a contract are "operative in accordance with the meaning attached to them by one of the parties if that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party." RESTATEMENT (SECOND) OF CONTRACTS § 20(2)(a) (1981) (explaining the effect of misunderstanding in determining mutual assent).

tersuit against petitioners suing them in this context. In a situation where a decedent left a written directive indicating a wish to be an organ donor and the decedent's next of kin brings a suit against medical professionals for harvesting organs, medical professionals can respond with a countersuit alleging that the decedent's next of kin tortiously interfered with a contract.⁹⁰ If an organ donor card is recognized as a legally binding document, then there is no reason why an action can not be brought for interfering with it. In this way, medical professionals have some way to protect themselves against the expense of litigation because they may be able to recover monetarily from their countersuit.

Furthermore, a designated organ recipient could also bring a cause of action against a decedent's next of kin for tortious interference with a contract.⁹¹ An organ donor may designate an intended recipient,⁹² and the designated recipient can be considered to be a third party beneficiary to the contract between the organ donor and OPO.⁹³ That recipient, as a third party beneficiary, has the power to enforce a contract.⁹⁴ Therefore, if the next of kin tried to prohibit, or was successful in prohibiting, the designated recipient from receiving an organ from the decedent, then the next of kin is interfering with the performance owed to the third party beneficiary.

If, on the other hand, there is no designated donee, it would be difficult for an individual on the transplant waiting list to claim third party beneficiary status. It would not be known to that individual that

⁹⁰ RESTATEMENT (SECOND) OF TORTS § 766 (1979) ("One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability."). To have standing to sue, medical professionals would probably have to somehow show that they were a party to the contract or argue that they are a third party beneficiary to the contract.

⁹¹ The problem would be that, if the suit was brought after the family had already prevented procurement of the organs, the designated recipient could only recover monetarily. It would be too late for an injunction requiring procurement. However, this Note is primarily concerned with deterrent effect, and such a suit would serve that purpose.

⁹² UNIF. ANATOMICAL GIFT ACT § 5(e) (1987) (discussing intended donees).

⁹³ RESTATEMENT (SECOND) OF CONTRACTS § 302(1) (1981) (A "beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties" and "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."). The UAGA states that, if the donor has specified an intended donee, the donee should be notified at or near the time of the donor's death. UNIF. ANATOMICAL GIFT ACT § 5(e).

⁹⁴ RESTATEMENT (SECOND) OF CONTRACTS § 304 ("A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.").

he or she would have received an organ transplant but for the dismissal of an organ donor card in favor of a family's wish that organs not be harvested from the decedent.⁹⁵ In theory, the individual could sue the potential organ donor's family for interference with a contract, but the logistics of such action are unclear.⁹⁶ It may be possible, however, for people waiting for transplants to bring a class action suit against a hospital for tortious interference with a contract if it is clear that that hospital's policy is to require familial consent before procuring organs from even a registered organ donor.

IV. INSUFFICIENT GROUNDS FOR SUIT AGAINST MEDICAL PROFESSIONALS FOR RESPECTING DONORS' WISHES

Setting aside the issue of illegality discussed above, donor registrations should not be disregarded because there is no legitimate fear of litigation for medical professionals since there are no adequate causes of action to be brought. The following sections will discuss protection against litigation for the medical profession; that is, protection afforded in cases of organ procurement where there is a donor registration. In such instances, protection is granted because the UAGA provides immunity, because the decedent's family lacks standing to bring a property conversion claim, and because the family lacks adequate grounds to bring an emotional distress claim.

A. Immunity Under the UAGA

The UAGA and its adoption in various forms among states provide an explicit immunity provision for medical professionals acting in good faith.⁹⁷ The provision states that a medical professional who acts in accordance with the UAGA "or attempts in good faith to do so is not liable for that act in a civil action or criminal proceeding."⁹⁸ Courts have readily applied this immunity provision and held for medical professionals in almost all cases where the medical profes-

⁹⁵ There is no mechanism available for people waiting for organ transplants to know that a registered organ donor has died and whether organs have been procured for transplantation from that decedent. Therefore, someone on the transplant waiting list would never know that a registered organ donor had died but that the decedent's organs had not been procured because medical professionals allowed the decedent's next of kin to override the donor registration.

⁹⁶ Because the prospective transplant recipient would not know who had died and had their wishes overridden by family members, he or she would not know the identity of the family member that could be sued for tortious interference.

⁹⁷ UNIF. ANATOMICAL GIFT ACT § 11(c) (1987).

⁹⁸ *Id.*

sional's conduct could be considered to fall within the bounds of the relevant state's anatomical gift act.⁹⁹ The Alabama Supreme Court recently failed to give protection to defendants through the Alabama Anatomical Gift Act's immunity provision, but, as will be explained, the facts of that case are such that the Court's holding does not weaken the immunity provision for medical professionals who remove organs from valid organ donors.¹⁰⁰

Courts have consistently applied immunity provisions laid out in states' respective anatomical gift acts. In both *Rahman v. Mayo Clinic*¹⁰¹ and *Callsen v. Cheltenham York Nursing Home*,¹⁰² medical professionals were found not liable for removing organs from decedents because the medical professionals' actions were made in good faith.¹⁰³ In the former case, the Minnesota Court of Appeals upheld summary judgment for a clinic and doctors in an action against them seeking damages for removing the plaintiff's son's pelvic block.¹⁰⁴ In that case, the plaintiff agreed in writing that the treating physician could remove organs and tissue from the plaintiff's son for purposes of donation.¹⁰⁵ Subsequently, the plaintiff added a restriction that the removed organs were not to be used for educational or research purposes, but the treating physician was unaware of this restriction because it was not included on the organ donation permission form.¹⁰⁶ When the decedent's pelvic block was removed and used for educational purposes at the Mayo Medical School, the plaintiff brought suit against the Mayo Clinic and the treating physician.¹⁰⁷ The court found that, because the physician and clinic had acted in good faith, Minne-

⁹⁹ See *Rahman v. Mayo Clinic*, 578 N.W.2d 802, 807 (Minn. Ct. App. 1998) (upholding summary judgment for clinic and doctors in an action against them seeking damages for retaining the decedent's pelvic block because the defendants acted in good faith and made an honest attempt to comply with the decedent's wishes); *Callsen v. Cheltenham York Nursing Home*, 624 A.2d 663 (Pa. Commw. Ct. 1993) (requiring an evidentiary showing of "good faith" by hospital and nursing facility to qualify for immunity when relevant facts are contested).

¹⁰⁰ See *George H. Lanier Mem'l Hosp. v. Andrews*, 901 So. 2d 714, 721-23 (Ala. 2004) (refusing to grant statutory immunity to defendants, a hospital, and a hospital employee because defendants failed to adhere to the statute's good faith terms).

¹⁰¹ *Rahman*, 578 N.W.2d 802.

¹⁰² *Callsen*, 624 A.2d 663.

¹⁰³ *Id.*; *Rahman*, 578 N.W.2d at 807.

¹⁰⁴ *Rahman*, 578 N.W.2d 802.

¹⁰⁵ *Id.* at 803.

¹⁰⁶ *Id.* at 803-04.

¹⁰⁷ *Id.* at 804.

sota's Anatomical Gift Act's immunity provision applied and defendants were not liable.¹⁰⁸

In *Rahman*, the organ donation form was filled out by the decedent's father and was not the result of the decedent's registration as an organ donor, but the case can be analogized to a situation in which a decedent has registered as a donor. If medical professionals act in good faith in respecting the organ donor card, that is, if they remove organs from a decedent for transplantation without first soliciting consent from the decedent's next of kin, *Rahman* clearly demonstrates that Minnesota courts would apply the Minnesota Anatomical Gift Act's immunity provision.¹⁰⁹ In *Rahman*, good faith was constituted by following a donor card as the physician thought it existed; the physician thought the card allowed for removing the decedent's organs for research purposes.¹¹⁰ Surely, then, good faith could be constituted by *simply adhering* to a donor card. Since a finding of good faith is enough to provide immunity,¹¹¹ if the next of kin brought suit for the procurement, summary judgment would be granted in favor of the medical professionals because there would be no claim for which relief could be granted.¹¹²

Similarly, in *Callsen v. Cheltenham York Nursing Home*, a Pennsylvania court applied and upheld the immunity provision in Pennsylvania's Anatomical Gift Act.¹¹³ In *Callsen*, the decedent's remains were given to the defendant hospital for medical dissection purposes without notice to the children of the decedent because the children could not be located.¹¹⁴ The children then filed suit.¹¹⁵ The decedent did not have an organ donor card, but, like *Rahman*, this case is analogous to a situation in which there is a donor card because medical professionals acted in accordance with their state's anatomical gift act, and, thereby, received immunity under that act.¹¹⁶

¹⁰⁸ *Id.* at 806-07.

¹⁰⁹ See MINN. STAT. § 525.9221(c) (2005) (providing that medical professionals acting in accordance with the applicable anatomical gift law, or attempting in good faith to do so, are not liable for that act in civil or criminal proceedings).

¹¹⁰ *Rahman v. Mayo Clinic*, 578 N.W.2d 802, 803-04 (Minn. Ct. App. 1998).

¹¹¹ MINN. STAT. § 525.9221(c).

¹¹² See FED. R. CIV. P. 12(b)(6) (providing for dismissal for "failure to state a claim upon which relief can be granted"); FED. R. CIV. P. 56 (discussing summary judgment).

¹¹³ *Callsen v. Cheltenham York Nursing Home*, 624 A.2d 663 (Pa. Commw. Ct. 1993).

¹¹⁴ *Id.* at 665.

¹¹⁵ *Id.* (claiming the defendants' negligent conduct in handling the deceased person's remains was excessive).

¹¹⁶ See 20 PA. CONS. STAT. § 8607(c) (1994) (current version at 20 PA. CONS. STAT. § 8616(c) (1994)) (providing that "a person who acts in good faith in accord

Although there is no published case where medical professionals' removal of organs for transplantation from a registered donor resulted in the donor's next of kin bringing suit for having not been consulted and having not consented first, *Rahman* and *Callsen* provide strong evidence as to how such a case would be resolved. Those cases indicate that courts are not likely to disregard the statutory immunity provided by the UAGA for medical professionals.

Despite the willingness of courts to grant immunity to medical professionals in the context of anatomical gifts, the Alabama Supreme Court recently deviated from this trend somewhat but only where there was no donor registration by the decedent.¹¹⁷ In *George H. Lanier Memorial Hospital v. Andrews*,¹¹⁸ the Alabama Supreme Court imposed liability on a hospital and physicians for removing organs from a decedent when the decedent's next of kin did not give unambiguous consent to the donation.¹¹⁹ There, a registered nurse overheard the decedent's mother express a willingness to donate in a conversation with another nurse, but a consent form was never signed by the decedent's mother or father.¹²⁰ Defendants claimed that the organ removal was conducted because of the belief that the mother desired to donate the organs, even though the defendants knew there was not *unequivocal* consent.¹²¹

That court did not dismiss the case or grant summary judgment for the defendants on the grounds that the defendants were immune from suit under Alabama's Anatomical Gift Act, as prior case law would suggest.¹²² Summary judgment was not granted because the plaintiffs claimed that they specifically stated that they did not want to donate the decedent's organs, so the decision as to whether the defendants acted in good faith was contingent upon a factual dispute.¹²³ Because disputes of facts prevent summary judgment and are for juries to decide, the case went to a jury, which found the defendants

with . . . anatomical gift laws . . . is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his act").

¹¹⁷ *George H. Lanier Mem'l Hosp. v. Andrews*, 901 So. 2d 714 (Ala. 2004).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 722-23.

¹²⁰ *Id.* at 717-18, 721.

¹²¹ *Id.* at 718-19.

¹²² For a similar case where summary judgment was granted for defendants, see *Rahman v. Mayo Clinic*, 578 N.W.2d 802 (Minn. Ct. App. 1998), which upheld summary judgment for clinic and doctors in an action against them seeking damages for retaining the decedent's pelvic block because the defendants acted in good faith and made an honest attempt to comply with the decedent's wishes.

¹²³ *George H. Lanier Mem'l Hosp. v. Andrews*, 901 So. 2d 714, 724-25 (Ala. 2004).

liable for negligent removal of organs from the decedent because the defendants erred in believing that the plaintiffs had given consent.¹²⁴ Nevertheless, this case does not show a tendency to deviate from statutory immunity provided in the UAGA because this court *could not* grant immunity since the jury found that the defendants had not met the provision's criteria of acting in good faith.¹²⁵

Furthermore, *Lanier* does not weaken this Note's claim that medical professionals should not fear litigation for respecting donor cards because there was no donor card in that case. In a situation where the decedent is a registered donor, there would most likely be no question of good faith for the jury. Therefore, when a donor card is present, medical professionals will be protected by the UAGA when they remove organs without obtaining consent from the next of kin because, by adhering to the donor card, the physicians have inherently acted in good faith, as *Lanier* demonstrated is required to receive protection through the UAGA's immunity provision.¹²⁶

B. Lack of Standing to Bring a Property Conversion Claim

Additionally, medical professionals are protected because a family member does not have standing to bring a conversion of property claim for the removal of organs from a donor, since the only property right traditionally recognized in the decedent's next of kin is a burial right.¹²⁷ Most courts have held that "a dead body is not the subject of property right."¹²⁸ Hence, property conversion claims brought by decedents' families against medical professionals have been largely unsuccessful.¹²⁹

¹²⁴ *Id.* at 719.

¹²⁵ *Id.* at 721-23.

¹²⁶ *Id.* at 722-23.

¹²⁷ See RESTATEMENT (SECOND) OF TORTS § 868 (1979); Ann McIntosh, Comment, *Regulating the "Gift of Life": The 1987 Uniform Anatomical Gift Act*, 65 WASH. L. REV. 171, 181-82 (1990) (providing additional commentary on how property rights of a decedent's body have been traditionally conferred on the decedent's surviving next of kin).

¹²⁸ *Newman v. Sathyavaglswaran*, 287 F.3d 786, 791 (9th Cir. 2002) (citing *Bessemer Land & Improvement Co. v. Jenkins*, 18 So. 565, 567 (Ala. 1895)) (discussing the traditional property right in a decedent being only a right to burial).

¹²⁹ See *Perry v. Saint Francis Hosp. & Med. Ctr.*, 865 F. Supp. 724, 726 (Kan. 1994) (articulating Kansas's common law that a property right is recognized in the body of the decedent only so far as that "the next of kin has a property right to possess the dead body of a relative for purposes of preserving and burying it"); see also *Bauer v. N. Fulton Med. Ctr.*, 527 S.E.2d 240 (Ga. Ct. App. 1999) (upholding dismissal of action for removal of appellant's deceased husband's eyes against appellant's wishes).

Courts have consistently held that a family's property right "encompasses only the power to ensure that the corpse is orderly handled and laid to rest, [but] nothing more."¹³⁰ This right has been referred to as a "quasi-property" right, which does not confer property and is a very broad assignment of property rights in the traditional sense.¹³¹ Instead, the term "property," in this context, is used for convenience in referring to the mere right to ensure a proper burial.¹³²

Considering this view of property, a family is unlikely to prevail in an action against medical professionals for removing organs in good faith on property conversion grounds. *Newman v. Sathyavaglswaran*¹³³ is the only reported case where medical professionals were held liable on such grounds, and in that case the decedents were minors and did not have organ donor cards.¹³⁴ Therefore, that case does not have much effect on a situation where the decedent is a registered donor. Furthermore, the *Newman* holding comes from the controversial Ninth Circuit,¹³⁵ and its dissent, stating that "there is no property in a dead body,"¹³⁶ is the more popular view.¹³⁷ Therefore, physicians should not fear property conversion-based litigation for harvesting organs from registered organ donors, and the wishes of such donors should be respected.

¹³⁰ *Bauer*, 527 S.E.2d at 244.

¹³¹ *Id.*; *Colavito v. N.Y. Organ Donor Network, Inc.*, 356 F. Supp. 2d 237, 242-43 (E.D.N.Y. 2005) (explaining how New York is in alignment with other jurisdictions in their view that quasi-property rights exist for family of the deceased only to ensure the body is properly laid to rest).

¹³² *Colavito*, 356 F. Supp. at 243. See *Newman*, 287 F.3d at 800 (Fernandez, J., dissenting) (stating that "[t]o the extent that any right exists, it is, in general, merely a right to possession," and "that right exists solely for the limited purpose of determining who shall have its custody for burial" (quoting *Sinai Temple v. Kaplan*, 127 Cal. Rptr. 80, 85 (1976) (citation omitted))).

¹³³ *Newman*, 287 F. 3d 786.

¹³⁴ *Id.* at 795-97 (holding that parents had a property interest in the corneas of their deceased children who were not registered organ donors).

¹³⁵ See Carolyn Lochhead, *Congress Moves to Divide Controversial Ninth Circuit Court: Western Judges Ruled Pledge Unconstitutional*, S. F. CHRON., July 24, 2002, at A6 (stating that the Ninth Circuit Court of Appeals "has a reputation for issuing inconsistent decisions and unpredictable precedents that are frequently overturned by the Supreme Court").

¹³⁶ *Newman*, 287 F.3d at 800 (Fernandez, J., dissenting) (citing *Enos v. Snyder*, 63 P. 170, 171 (Cal. 1900)).

¹³⁷ *Bauer v. N. Fulton Med. Ctr.*, 527 S.E.2d 240, 244 (Ga. Ct. App. 1999); *Colavito v. N.Y. Organ Donor Network, Inc.*, 356 F. Supp. 2d 237, 243 (E.D.N.Y. 2005).

C. Inadequate Grounds for an Emotional Distress Claim

Another claim decedents' next of kin may consider bringing against medical professionals for removal of organs without familial consent is an intentional infliction of emotional distress claim. This tort claim allows recovery for emotional injuries intentionally caused by the defendant, despite the absence of physical injury.¹³⁸ Like a property conversion claim, however, this claim lacks merit in an organ donor case because the elements cannot be proven. Hence, a medical professional should not refrain from respecting donor cards out of fear that an emotional distress claim will be brought.

In order to prevail in an intentional infliction of emotional distress claim, the defendant must have caused severe emotional distress to the plaintiff by outrageous and extreme conduct.¹³⁹ Furthermore, the conduct must have been intended by the defendant to cause severe emotional distress, or the defendant must have acted with reckless disregard to the victim's emotional state.¹⁴⁰

Most states do not require that the plaintiff suffer physical manifestations of distress, so that lessens the burden for a family member bringing an emotional distress claim.¹⁴¹ Meeting the requirement of "outrageous" or "extreme" behavior, though, would be an obstacle because such behavior has been defined as conduct that is "beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community."¹⁴² Removing organs from a registered organ donor for the transplantation into a desperate donee can hardly be labeled as such. Moreover, it would be difficult to say that a physician intentionally or recklessly inflicted the emotional distress.

Additionally, the Restatement of Torts requires that a third person claiming to suffer emotional distress must have been present at the time of the outrageous and extreme conduct.¹⁴³ Because the person at whom the outrageous and extreme conduct was directed would be the decedent, the next of kin attempting to bring this claim would be a third person. Therefore, the family member bringing the emotional distress claim would have had to have been present when the suppos-

¹³⁸ RESTATEMENT (SECOND) OF TORTS § 46 (1965).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at cmt. i (stating that recklessness is sufficient for intent).

¹⁴¹ See, e.g., *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282, 286 (Cal. 1952) (discussing the arguments made for permitting causes of action in torts cases based on mental rather than physical injury, and taking the position that a jury is in the best position to decide the existence and severity of the mental injury).

¹⁴² RESTATEMENT (SECOND) OF TORTS § 46 cmt. d.

¹⁴³ RESTATEMENT (SECOND) OF TORTS § 46.

edly "outrageous" conduct occurred, that is, when the organs were procured. That requirement would make it virtually impossible for this claim to be brought because it is almost certain that the family member would not be present for the removal of organs from the decedent.¹⁴⁴

On the other hand, the Restatement states in a comment that the limitation allowing recovery only for plaintiffs present at the time is in place simply to fulfill "the practical necessity of drawing the line somewhere."¹⁴⁵ The comment goes further to assert that the requirement "is intended, however, to leave open the possibility of situations in which the presence at the time may not be required."¹⁴⁶ That consideration, however, does not appear to make an emotional distress claim by a family member any more apt to be successful since the standards to prove the other elements of the claim—outrageousness and extremity, as well as intent or recklessness—are so high. Consequently, elements of an emotional distress claim cannot be met, and there is no legitimate claim that can be brought on these grounds.

As this Part explains, the medical profession should not fear a lawsuit from decedents' next of kin for harvesting organs without the next of kin's consent. The immunity provisions in states' anatomical gift acts provide almost complete protection for medical professionals by only requiring that the actions be in good faith. Moreover, there are no adequate grounds for a family member to bring a property conversion or intentional infliction of emotional distress claim. Hence, medical professionals' fears of lawsuit should be alleviated, and these excuses for disregarding donor cards are unfounded.¹⁴⁷

V. MORAL OBLIGATION TO RESPECT DONORS' AUTONOMY

Society has traditionally placed a great amount of emphasis on individual autonomy, and, thus, autonomy should be a factor in the organ donation context.¹⁴⁸ Over the years, it has become increasingly

¹⁴⁴ RESTATEMENT (SECOND) OF TORTS § 46 cmt. 1 (Thus far, liability has been limited "to plaintiffs who were present at the time, as distinguished from those who discover later what has occurred.").

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ It should also be noted that a suit on behalf of the decedent would be unlikely because the only claim would be battery, and, because battery is an unconsented-to touching, the claim would be without merit since the decedent consented to the touching by registering as an organ donor. RESTATEMENT (SECOND) OF TORTS § 13 cmt. c.

¹⁴⁸ GARRISON & SCHNEIDER, *supra* note 19, at 27.

important to people that they have control over their own bodies.¹⁴⁹ Bioethicists believe that autonomy is a fundamental principle, and its significance has been demonstrated through the rise of informed consent requirements¹⁵⁰ and the use of advance directives.¹⁵¹ Consequently, it is immoral to disregard the much-valued standard of autonomy in the context of organ donation.

A. Definition and Place in Bioethics

The principle of autonomy provides another basis for respecting a donor's wishes, though this basis is grounded in morality and societal consensus rather than in the law. Autonomy is considered a fundamental principle in American bioethics and refers to individualism, including a right to make determinations regarding one's own body.¹⁵² Medical ethics, as expressed in leading bioethics books, has adopted autonomy as one of the key dominating principles that "should always be respected unless some strong countervailing reason exists to justify overruling" it.¹⁵³ Autonomy is viewed as "consistent with the individual temper of American life, which emphasizes privacy and self-determination."¹⁵⁴ Hence, society, as well as the medical profession, has come to place a great deal of emphasis on the importance of deciding how one's own body shall be cared for and treated.

As a dominating and valued ideal in American culture, autonomy in health care decision making has benefits including the following:

¹⁴⁹ Robert M. Veach & Daniel Callahan, *Is Autonomy an Outmoded Value?*, HASTINGS CENTER REP., Oct. 1984, at 38, 38 (discussing the history of how "the patient as a dignified agent free to participate in and exercise self-determination over medical decisions" has come to be the dominant view in society today).

¹⁵⁰ *Canterbury v. Spence*, 464 F.2d 772, 780-81 (D.C. Cir. 1972) (drawing from several academic sources, the court created the doctrine of informed consent to bring medical practice up to date with society's goal of autonomy and self-determination).

¹⁵¹ See, e.g., *Klavan v. Crozer-Chester Med. Ctr.*, 60 F. Supp. 2d 436, 440 (E.D. Pa. 1999) (holding that someone in a persistent vegetative state, who had an advance directive stating that he did not wish to be kept alive under such circumstances, should be allowed to die because the patient has a protected liberty interest in the autonomous decision to refuse medical treatment); see also UNIF. HEALTH-CARE DECISIONS ACT § 2 (1993) (This Act, adopted by many states, allows a person to give instructions as to what his or her health care treatment should be if he or she becomes unable to make such decisions.).

¹⁵² GARRISON & SCHNEIDER, *supra* note 19, at 27; THE NEW AMERICAN WEBSTER HANDY COLLEGE DICTIONARY 55 (Albert Morehead & Loy Morehead eds., Penguin Group 1995) (1951).

¹⁵³ Edmund D. Pellegrino, *The Metamorphosis of Medical Ethics: A 30-Year Perspective*, 269 JAMA 1158, 1160 (1993).

¹⁵⁴ *Id.*

First, the principle encourages better health because patients may make better decisions for themselves than others can make for them. Second, the principle contributes to the regulation of medicine as a profession and an enterprise because it exposes medicine's decisions to inspection and cabins medicine's power to impose its will. Third, the principle helps patients realize what they want—control—and achieve it. Fourth, the principle helps patients reap the moral advantages that accrue to people who take responsibility and authority for their own lives.¹⁵⁵

Furthermore, a vast number of bioethicists endorse the idea of autonomy as a *moral duty* imposed upon medical professionals.¹⁵⁶ The consensus of society and of bioethicists appears to be that physicians should allow competent patients to make their own decisions or at least assume a great amount of responsibility in making their health care decisions.¹⁵⁷ The benefits and individualism that result have distinguished autonomy as a major factor in medicine today.

B. Application to Organ Donation

Because the principle of autonomy is so highly prized in United States culture, religion, and professional standards, it is important to respect it in the context of organ donation just as much as in any other medical decision.¹⁵⁸ The self-determination of individuals would be destroyed if a deceased donor's gift is rejected because of a lack of consent by the decedent's next of kin. A family member's demand that organs not be procured from a registered organ donor improperly trumps what should be an autonomous decision by the deceased.¹⁵⁹ Considering society's emphasis on autonomy, it is unethical to allow a next of kin's decision to take precedence over what the decedent has determined should be the fate of his or her own body. Hence, medical

¹⁵⁵ GARRISON & SCHNEIDER, *supra* note 19, at 146-47.

¹⁵⁶ *Id.*

¹⁵⁷ See generally E. HAASI MORREIM, *BALANCING ACT: THE NEW MEDICAL ETHICS OF MEDICINE'S NEW ECONOMICS* (1995) (using the changing norm of patients being responsible for their own health care as a basis for a variety of economic arguments).

¹⁵⁸ Bucklin, *supra* note 10, at 349; Theresa J. Shafer et al., *Ethical Analysis of Organ Recovery Denials by Medical Examiners, Coroners, and Justices of the Peace*, 9 J. TRANSPLANT COORDINATION 232, 239 (1999).

¹⁵⁹ Candice Cummins Gauthier, *Philosophical Foundation of Respect for Autonomy*, 3 KENNEDY INST. ETHICS J. 21, 22 (1993).

professionals should feel morally obligated to respect the autonomy of the decedent and give deference to an organ donor card.

Medical professionals continue adherence to autonomy to the greatest extent possible in contexts other than that of organ donation, making clear their deference to the principle. The issue of informed consent and use of advance directives, for example, conform to the idea that a patient has the right to make decisions regarding his or her own body.¹⁶⁰ It is morally inconsistent, then, not to place a similar importance on self-determination in the context of organ donation.

Informed consent has come to mean that medical professionals have an obligation to give patients all information about their condition that a reasonable patient would want to know.¹⁶¹ Medical professionals are required to lay out the various treatment options and to allow patients to make their own decisions with full knowledge of the facts.¹⁶² Similarly, an organ donor has made an informed decision about the fate of his or her own body. Registering as an organ donor is exercising one's right to self-determination, and it is unethical for medical professionals to ignore such a decision.

Additionally, the use of advance directives can be analogized to the organ procurement context. Do-not-resuscitate orders, living wills, and appointments of surrogate decision makers are based on the importance of an autonomous individual, able to make his or her own decisions about health care. Such decisions are routine and often statutorily supported.¹⁶³ The Illinois legislature, for one, has explicitly promoted autonomy in stating that "[t]he legislature recognizes that all persons have a fundamental right to make decisions relating to their own medical treatment."¹⁶⁴ Surely, this right also applies to the decision whether to donate one's organs upon death.

¹⁶⁰ GARRISON & SCHNEIDER, *supra* note 19, at 316 (stating that "[t]he principle motive for advance directives has been the hope that they would promote patients' autonomy").

¹⁶¹ *Canterbury v. Spence*, 464 F.2d 772, 782 (D.C. Cir. 1972) (finding that physicians are a type of fiduciary and that they have a duty to disclose all relevant information to patients so that patients can make informed decisions about their own health care).

¹⁶² *Id.* at 782-83.

¹⁶³ See N.Y. PUB. HEALTH LAW § 2960 (Consol. 2006) (titled "Orders Not to Resuscitate" and granting the right to create an order not to administer cardiopulmonary resuscitation if a person desires); UNIF. HEALTH-CARE DECISIONS ACT § 2 (1993) (allowing a person to give instructions as to what his or her health care treatment should be if he or she becomes unable to make such decisions).

¹⁶⁴ 755 ILL. COMP. STAT. 40/5-5(a) (2005); see 755 ILL. COMP. STAT. 35/1 (2005).

Medical professionals do not tend to ignore an individual's wishes in favor of a family member's in the advance directive context, as they do in the organ donation context, because courts will not allow them to do so. For instance, when a patient in a persistent vegetative state has an advance directive indicating that he or she does not wish to be kept alive in such circumstances, physicians may attempt to keep that person alive, perhaps for their own reasons or perhaps to avoid suit from family members, but courts are reluctant to refuse to uphold advance directives made by competent individuals.¹⁶⁵

Similarly, courts will not allow autonomous decisions to be overridden in the informed consent context. Except in a few exceptional circumstances,¹⁶⁶ medical professionals are not allowed to act in accordance with a family member's desire for a procedure to take place unless the patient consented.¹⁶⁷ For example, in a case where a woman had a gangrenous leg and would die if the leg was not amputated, a Massachusetts court held that the woman did not have to comply with her adult children's insistence that she have the amputation.¹⁶⁸ The court held that she competently made an autonomous decision to refuse treatment, so the decision should be respected.¹⁶⁹ That case demonstrates that a physician cannot proceed with a procedure different than that to which the patient consented simply due to the patient's

¹⁶⁵ *In re Janet S.*, 712 N.E.2d 422 (1999) (reversing an order that required the involuntary administration of psychotropic drugs because the petition seeking the order did not allege there had been a good faith effort made to determine whether the patient had executed an advance directive for health care, thus, demonstrating that an advance directive would prevail).

¹⁶⁶ These exceptions include circumstances when the patient does not have the capacity to consent, circumstances where informing the patient would ultimately cause more harm, circumstances that qualify as an emergency; circumstances in which treatment is mandatory; and circumstances in which the patient has waived his or her right to informed consent. *Canterbury*, 464 F.2d at 788-89 (stating circumstances under which informed consent does not have to be obtained from a patient).

¹⁶⁷ *Lane v. Candura*, 376 N.E.2d 1232, 1235-36 (Mass. Ct. App. 1978) (holding that a patient cannot be rendered legally incompetent only because his or her decision concerning care may result in death). Even in situations involving children, courts have given a great deal of deference to the child's decision about his or her own medical treatment. In a situation where the child's decision would be a healthier choice than what that child's parent desires, courts will act in accord with the child's decision. This comes up in the context of when parents are Jehovah's Witnesses, and, therefore, refuse to allow their child to have a blood transfusion. Although courts are not in agreement as to whether to force the transfusion if the child agrees with the parents that a transfusion should not be given, courts do agree that the transfusion should take place if the child disagrees with the parents and desires the transfusion. *In re Green*, 292 A.2d 387, 392 (Pa. 1972).

¹⁶⁸ *Lane*, 376 N.E.2d at 1235-36.

¹⁶⁹ *Id.*

family's requests. It would seem, then, that such action should not be allowed in the organ donation context either.

It is debatable to what extent a deceased person actually has an autonomy interest, and, therefore, to what extent these analogies are applicable to this Note's overall argument. It is not clear that the deceased can reap all the benefits of autonomy that serve as bases for supporting the theory of autonomy in health care decision making. For instance, making the decision to be an organ donor does not appear to encourage better health for the individual on the grounds that individuals can make better decisions for themselves than others can make for them. Whether a person is an organ donor does not have any impact on his or her health. It is unlikely that a person would decide to live a healthier lifestyle in order to have healthier organs to donate after death. In other words, making the choice to be an organ donor is not making a decision impacting one's own health.

On the other hand, control over one's own body is also a main purpose of autonomy in medical decision making.¹⁷⁰ Certainly, most would expect that this control would not end with death if they had left specific instructions as to how their bodies should be handled. Furthermore, having a mandatory instruction to harvest organs upon death would "cabin[] medicine's power to impose its will," which is an additional asserted benefit of autonomy.¹⁷¹ Hence, some of the advantages of autonomy exist even when a person is no longer alive, and, therefore, it would seem that the deceased still has an autonomy interest, at least in the organ donation context.

Accordingly, reverence for individual autonomy should logically flow to the organ donation setting. Thus, respecting organ donor registrations seems to be the only morally acceptable action.

CONCLUSION

It is easy to understand that families would want to have a say in what happens to their loved ones' bodies. After all, the next of kin's burial right, as discussed in Part IV B., could arguably include the right to bury the deceased's *entire* body. Furthermore, many people believe that their religion prohibits organ donation.¹⁷² For instance, a

¹⁷⁰ See GARRISON & SCHNEIDER, *supra* note 19, at 146-47; Wayne Shelton, *Respect for Donor Autonomy and the Dead Donor Rule*, 3 AM. J. BIOETHICS 20, 20 (2003) (advocating that individuals should be able to "donate organs based on their autonomous wishes").

¹⁷¹ GARRISON & SCHNEIDER, *supra* note 19, at 147; see Shelton, *supra* note 170.

¹⁷² Kathie Kroot, *A Jewish Perspective on Organ Transplantation*, TRANSWEB.ORG, May 11, 2000, <http://www.transweb.org/reference/articles/religion/>

study in one Jewish community found that a large number of respondents believed that Jewish law prohibits organ donation, even though this is not actually true.¹⁷³ In actuality, all major religions—Buddhism, Christianity, Hinduism, Islam, Judaism, and Sikhism—support organ donation and transplantation because relieving suffering and saving lives are central components of those faiths.¹⁷⁴

Medical professionals are in a sticky situation because they are probably simply following hospital protocol by asking for permission from the deceased's family to procure organs.¹⁷⁵ It should be remembered, however, that there is no reported case where a deceased was a registered donor, organs were procured from that donor, and the family sued because of the procurement. Therefore, medical professionals should perhaps push for a change in hospital protocol.

This Note has argued that organ donor cards should be respected and that the all-too-often occurrence of medical professionals allowing a deceased organ donor's next of kin to have veto power over anatomical donation is illegal and immoral. The illegality stems from statutory provisions in state anatomical gift acts and from breach of contract. In making this case, this Note further argues that there is no successful cause of action that can be brought against medical professionals for respecting organ donor cards, and, therefore, there is no legitimate reason why organ donors' wishes should ever be trumped by the decedent's next of kin. Lastly, beyond the legality of this issue lies an ethical question of whether it is morally wrong not to procure organs from a registered organ donor. Considering the emphasis that society today places on individual autonomy in all areas of life and especially in the medical setting, it appears clear that the moral course of action is to respect the wishes of the decedent. Allowing familial veto power over a decedent's wish to be an organ donor is, for all the reasons set forth here, a practice that should cease. In respecting organ donor registrations, medical professionals should have no fear of lawsuits and should take comfort in the morality of their actions.

shalomarticle.html (explaining that organ donation is allowed in the Jewish religion).

¹⁷³ *Id.*

¹⁷⁴ BBC Health, DoNation Journey, http://www.bbc.co.uk/health/donation/nonflashjourney_religions.shtml (last visited Sept. 17, 2006) (stating that "all the major religions of the UK support organ donation and transplantation" and discussing the different schools of thought on this issue).

¹⁷⁵ See McKenny & Parker, *supra* note 30, at 974.

